SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Office Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 73–1761

DISTRIGAS CORPORATION,
DISTRIGAS OF NEW YORK CORPORATION and
DISTRIGAS OF MASSACHUSETTS CORPORATION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,
Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR INTERVENOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. IN SUPPORT

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1. Petitioners seek review of the judgment of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a-19a) affirming the orders of the Federal Power Commission issued May 25, 1973 (Pet. App. B, pp. 20a-27a) and June 20, 1973 (Pet. App. C, pp. 28a-36a). Consolidated Edison Company of New York, Inc. (Con Edison) supports the Petition for Writ of Certiorari to review the judgment of the Court below.

2. Con Edison is a New York corporation and is a public utility subject to the jurisdiction of the Public Service Commission of the State of New York. Con Edison's service area for the distribution of natural gas is in New York City and Westchester County, New York. It serves natural gas to more than 1,170,000 residential, commercial, and industrial customers in the described area.

3. Con Edison receives its supplies of natural gas from four interstate natural gas pipeline companies, three of which are curtailing services to Con Edison because of supply deficiencies. One of the Petitioners, Distrigas of New York Corporation, is constructing liquified natural gas (LNG) facilities on Staten Island, New York, by means of which it proposes to render service to markets in New York, New Jersey, Maryland, and other places. Petitioners proceeded with construction of the LNG facilities in reliance on the Federal Power Commission's Opinion and Order Nos. 613 and 613–A, dated March 9, 1972, and June 7, 1972, 47 FPC 752 and 1465, respectively. The Order and Opinion were final and non-appealable at the time the Commission suddenly reversed its jurisdictional determination in its May 25, 1973, Order, on which rehearing was denied June 20, 1973. The entire project is thus placed in jeopardy. Con Edison had expected that it would receive service from said Distrigas facilities in the future and the loss of supplies from this potential source could affect Con Edison's ability to serve its markets.

4. A Writ of Certiorari should be granted because the Court below has determined that the requirements under Section 7 of the Natural Gas Act (15 U.S.C. 717) can be imposed on an applicant seeking authority under Section 3 of the Natural Gas Act to import or export natural gas, notwithstanding the applicability of Section 1(b) of the Act. Under this interpretation a company like Con Edison, fully regulated as to rates and services by the New York Public Service Commission, could be subjected to regulation as a natural gas company under FPC jurisdiction. While not specifically over-

ruling ***Border Pipeline Company*** v. ***FPC***, 84 U.S. App. D.C. 142, 171 F.2d 149 (1948), the Court below effectively held that the FPC could, under the aegis of Section 3 of the Act, concurrently exercise regulatory authority with state bodies over intrastate facilities and sales of LNG, if the FPC found that the public interest requires comprehensive federal regulation.

Furthermore, the reliance by the Court below on the "terms and conditions" language of Seciton 3 and the authority there vested does not adequately account for refusal to give weight to the reliance that Distrigas placed in the previously submitted Section 3 import permit. It is by no means certain that the Commission can change the law or should be allowed to change policy in the same case after an applicant has relied, to its detriment, on an earlier order. In the transition between the first set of orders and the second, the Commission reversed a determination on an issue of law and not of fact in what is essentially the same case. The Court below incorrectly infers that Section 3 allows the revocation of an import permit retroactively when it did not overturn the FPC's action. The retroactive application of a principle of law in a case of second impression creates an inequitable impact on the applicant which is not proper.[1] Due process of law and a fair sense of justice require otherwise.

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[1] See ***N.L.R.B.*** v. ***Majestic Weaving Co.***, 355 F.2d 854, 860 (2d Cir. 1966). See also Davis, "Administrative Law Treatise", Section 17.09, p. 607.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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